

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs September 26, 2006

DAVID BRIMMER v. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for Anderson County
No. AOCR0176 James B. Scott, Jr., Judge

No. E2005-02328-CCA-R3-PC - Filed November 30, 2006

The petitioner, David Brimmer, filed in the Anderson County Criminal Court a petition for post-conviction relief, alleging that the trial court allowed him to plead guilty to aggravated kidnapping when he had not been indicted for that offense and that the trial court improperly sentenced him under the 1989 Sentencing Act. The post-conviction court denied the petition. On appeal, the petitioner contends that the post-conviction court erred in denying the petition without conducting an evidentiary hearing. Upon our review of the record and the parties' briefs, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which ALAN E. GLENN and J.C. McLIN, JJ., joined.

Mart S. Cizek, Clinton, Tennessee (on appeal and at trial), and Gerald Gulley, Knoxville, Tennessee (at trial), for the appellant, David Brimmer.

Paul G. Summers, Attorney General and Reporter; Leslie E. Price, Assistant Attorney General; James N. Ramsey, District Attorney General; and Jan Hicks, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

_____The petitioner was convicted by a jury of premeditated first degree murder, and he was sentenced to death. On direct appeal, our supreme court upheld his conviction and death sentence. State v. Brimmer, 876 S.W.2d 75 (Tenn. 1994). Thereafter, the petitioner filed a post-conviction petition, complaining of the ineffective assistance of counsel at his murder trial and sentencing hearing. On appeal, this court found that counsel was effective during trial but was ineffective at the

penalty phase. See Brimmer v. State, 29 S.W.3d 497, 502 (Tenn. Crim. App. 1998). As a result, this court remanded for a new sentencing hearing. Id.

The limited record before us reflects that after the murder case was remanded, the petitioner entered a guilty plea to an aggravated kidnapping charge and accepted an accompanying sentence of sixty years to be served at one hundred percent in exchange for a life sentence on the first degree murder conviction. The petitioner, acting pro se, subsequently filed the instant petition for post-conviction relief, alleging that his plea counsel was ineffective, the trial court should not have allowed him to plead guilty to aggravated kidnapping when he had not been indicted for that offense, and the trial court improperly sentenced him for aggravated kidnapping under the 1989 Sentencing Act when the offense was committed just prior to the effective date of the Act.

_____ After reviewing the petitioner's initial pro se brief, the post-conviction court found that the petitioner had made a colorable claim for relief and appointed counsel to assist the petitioner. Appointed counsel filed an amended post-conviction petition, withdrawing the claim of the ineffective assistance of plea counsel but proceeding upon the pro se brief on the remaining two issues.

The post-conviction court conducted a hearing in which post-conviction counsel was questioned about the petitioner's post-conviction complaints. At the hearing, counsel advised the court that the ineffective assistance issue was not being pursued, explaining "I think basically it reduced [the post-conviction action] to questions of law where you don't have to have an evidentiary hearing." Counsel for the State also informed the court that "I don't believe that anything is required in that other than as [the petitioner's counsel] says, it's a pure question of law. I don't believe anything is required in that except the paperwork, because there's no allegations raised that the Court's inquiry [into the plea] was in any way improper or defective." The post-conviction court ended the hearing with a promise to further examine the issues raised by the petitioner.

Afterward, the post-conviction court filed an order denying post-conviction relief. In the order, the post-conviction court stated that the petitioner was charged by information for aggravated kidnapping. The court also stated that the petitioner agreed to accept a sixty-year sentence for the aggravated kidnapping conviction in exchange for the State foregoing the death penalty on the first degree murder conviction. Therefore, the post-conviction court denied relief. On appeal, the petitioner contends that the post-conviction court erred in denying relief without conducting an evidentiary hearing.

II. Analysis

Without addressing the merits of the petitioner's claim, we are constrained to note that in his appellate brief, the petitioner fails to argue why the post-conviction court erred by failing to conduct a hearing or explain what evidence he could have produced at an evidentiary hearing. In fact, the petitioner's brief is completely devoid of argument. Further, the petitioner cites no authority, failing to cite even the most basic of post-conviction law, namely the Post-Conviction Procedure Act. See

Tenn. Code Ann. § 40-30-101, *et. seq.* (2003). This court has repeatedly cautioned that appellate briefs must be supported by argument and citation to authority, or the party filing the brief risks waiver of the issues contained therein. See Tenn. Ct. Crim. App. R. 10(b) (“Issues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court.”); Tenn. R. App. P. 27(a)(7) (“The brief of the appellant shall contain . . . [a]n argument . . . setting forth the contentions of the appellant with respect to the issues presented, and the reasons therefor, including the reasons why the contentions require appellate relief, with citations to the authorities and appropriate references to the record . . .”).

Moreover, the petitioner compounded his failure to properly prepare the brief by also failing to include in the record the plea agreement, the document charging the petitioner with aggravated kidnapping, or the judgments of conviction for the aggravated kidnapping or first degree murder convictions.¹ The post-conviction court’s order denying the petition clearly indicates that such materials were considered by the court in making its decision to deny the petition without conducting an evidentiary hearing. Therefore, in order to facilitate our review of the court’s ruling, we must also examine these materials.² The petitioner carries the burden of ensuring that the record on appeal conveys a fair, accurate, and complete account of what has transpired with respect to those issues that are the bases of appeal. Tenn. R. App. P. 24(b); see also Thompson v. State, 958 S.W.2d 156, 172 (Tenn. Crim. App. 1997). “In the absence of an adequate record on appeal, this court must presume that the trial court’s rulings were supported by sufficient evidence.” State v. Oody, 823 S.W.2d 554, 559 (Tenn. Crim. App. 1991). We are unable to review the merits of the petitioner’s issue due to the incomplete appellate record and the lack of argument regarding his issues.

III. Conclusion

Based upon the foregoing, we affirm the judgment of the post-conviction court.

NORMA McGEE OGLE, JUDGE

¹ On appeal, the State noted all of the foregoing infirmities to the petitioner’s brief and appellate record, placing the petitioner on notice that the record was incomplete and the brief was improperly prepared.

² We note that the petitioner attached certified copies of the judgments of conviction for the aggravated kidnapping and murder convictions to his appellate brief. However, “documents attached to an appellate brief but not included in the record on appeal cannot be considered by this court as part of the record on appeal.” Grover L. Dunigan v. State, No. E2005-01574-CCA-R3-PC, 2006 WL 433699, at *3 (Tenn. Crim. App. at Knoxville, Feb. 23, 2006), perm. to appeal denied, (Tenn. 2006); see also State v. Matthews, 805 S.W.2d 776, 783-84 (Tenn. Crim. App. 1990).